Supreme Court, U.S.
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No. 98-1588

In The

Supreme Court of the United States

October Term, 1998

BARRY ROBERT BENTON,

Petitioner,

v.

COMMISSION FOR LAWYER DISCIPLINE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Is Rule 3.06(d) of the Texas Disciplinary Rules of Professional Conduct violative of the First Amendment?

Is Rule 3.06(d) of the Texas Disciplinary Rules of Professional Conduct unconstitutionally overbroad?

Is Rule 3.06(d) of the Texas Disciplinary Rules of Professional Conduct violative of the Equal Protection Clause?

Is Rule 3.06(d) of the Texas Disciplinary Rules of Professional Conduct unconstitutionally vague?

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PERTINENT RULES INVOLVED

Rule 306(d) of the Texas Disciplinary Rules of Professional Conduct and the Rules listed at App. 1-3[1] are based on DR7-108(D) of the ABA Model Code of Professional Responsibility. The provisions of DR7-108(D) are now restated in Model Rules 4.4 and 3.5. MODEL RULES OF PROFESSIONAL CONDUCT 3.5, 4.4 (1991).

STATEMENT OF THE CASE

Two additions must be made to Petitioner's Statement of the Case. First, Benton did "influence [jurors'] actions in future jury service." One of the jurors who testified at the disciplinary hearing stated that if he was ever called for jury service again, he would express bias in the voir dire examination so that he would be excluded from the jury. His reason for doing so would be to avoid ever receiving such an insulting letter again. A15-16. Another juror had been active in voter registration. After receiving Benton's letter, she quit that praiseworthy civic activity. In Texas, juror lists are derived in part from voter registration lists. The juror no longer wanted to ask people to register to vote, because if they asked her about jury duty, she would have been obligated to tell them about how Benton had abused her. A16.

The second addition is that as well as eliminating "embarrass" from the rule, the Texas Supreme Court further narrowed the rule by defining "harass" to mean "(1)

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[1] References to the Petitioner's Appendix appear as A___; to the Respondent's Appendix appear as App. ___.

a course of conduct, (2) directed at a specific person or persons, (3) causing or tending to cause substantial distress, and (4) having no legitimate purpose." A30-31.

ARGUMENT AND AUTHORITIES

I. RULE 3.06(d) OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT DOES NOT VIOLATE THE FIRST AMENDMENT

The restriction on lawyers speech at issue herein is exceptionally narrow. Benton could have written a letter to the editor of his local newspaper stating his opposition to the tort reform movement. He could have rented billboard space and proclaimed his views to passing motorists. Lawyers advertise extensively on television, and Benton could have purchased air time and vented to his heart's content. He wasn't really restricted at all as to what he could say. He was restricted as to the targets of his invective. Out of the entire population of the state of Texas, there were only twelve people whom Rule 3.06(d) protected from Benton's tirade.

In the balancing which will take place in this case, the court must weigh Benton's right to unfettered free speech against jurors' rights to be protected from post-verdict attacks by the losing lawyer. Benton tries to make a point of the fact that the case was no longer pending when he sent his diatribe to the jurors. Of course it wasn't. No lawyer would be foolish enough to attack a jury *before* it rendered its verdict. That would hardly endear the lawyer's client to the jury. Generally, there is

nothing to attack a jury about until it has rendered its verdict.

Texas and eighteen other states and the Model Rules have seen fit to protect jurors from post-verdict attacks by the lawyers who tried the case before them.[2] Jury service is burdensome. The juror is taken away from his job. Many jurors suffer serious economic damage. During the time the juror is in the jury box, deliberating, or sequestered, he is taken away from his loved ones. In complex litigation, he is confronted with trying to understand and resolve issues with which he has absolutely no familiarity at all. In many criminal and family law cases he is faced with facts which are tragic, sordid, and present a side of human nature many people have never encountered. He is required to make a sometimes difficult decision in cooperation with eleven other people he doesn't know. Citizens have many completely valid reasons to avoid jury duty.

The founding fathers considered the right to a trial before a jury of one's peers in criminal cases to be such a fundamental right that they assured it in the Sixth Amendment to the Constitution. As early as lower school, our educational system teaches our children that jury service is an important civic duty. Many states have laws prohibiting employers from punishing employees for time lost from work because of jury duty. Few inside or outside of the justice system would disagree that jury duty should be encouraged.

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[2] See the Appendix to this brief.

It is that irrefutable proposition – or its also irrefutable flipside, that jury duty should not be discouraged – that led to the enactment of Rule 3.06(d) and its counterparts in other states. The public policy purpose behind the rule is valid and important. That is one side of the balancing equation. The other side is restricting the free speech of lawyers.

The balancing between the free speech rights of lawyers and the right to impartial jury trials was described by the Texas Supreme Court as follows:

> This is such a case because it requires us to resolve a conflict between the expressive rights of attorneys and the public's right to impartial jury trials – a right described in Texas's Declaration of Independence as 'that palladium of civil liberty, and only safe guarantee for the life, liberty, and property of the citizen,' and prominently enshrined in both constitutions. *See* U.S. Const. amends. VI, VII; Tex. Const. Art. I, § 10, 15; *id.* art. V § 10.

A6.

This Court has long upheld the common law rule against admission of jury testimony to impeach a verdict.

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result

> would be to make what was intended to be a private deliberation, the constant subject of public investigation – to the destruction of all frankness and freedom of discussion and conference.

McDonald v. Pless, 238 U.S. 264, 267-268 (1915). Rule 3.06(d) – albeit for different reasons – is also intended to protect jurors from being "harassed and beset by the defeated party."

More recently, this Court has recognized that protection of the jury system justifies prohibiting post-verdict investigations.

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to protect it.

Tanner v. U.S., 483 U.S. 107, 120 (1987). Rule 3.06(d) is grounded in the same concern about preserving the jury system. It is a bedrock of our judicial system, entitled to great weight when being balanced against attorneys' rights to free speech.

While there are differences in the purposes of rules restricting lawyers' communications with the press during a trial and rules restricting lawyers' communications with jurors after a trial, all of such rules have the common goal of protecting the integrity of our judicial system. The Texas Supreme Court cites several cases which seek to protect the jury system by prohibiting post-verdict juror harassment. *McDonald v. Pless*, 238 U.S. 264, 267-268 (1915); *Tanner v. United States*, 483 U.S. 107, 120 (1987);

United States v. Antar, 38 F.3d 1348, 1363 (3d Cir. 1994); *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir. 1985); *United States v. Harrelson*, 713 F.2d 1114, 1116 (5th Cir. 1983); *United States v. Moten*, 583 F.2d 654, 666 (2d Cir. 1978).

This Court's most recent opinion on state disciplinary rules restricting lawyers' professional speech is *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). Gentile was reprimanded for statements he made at a press conference the day his client was indicted. A majority of this Court held that the Nevada rule's "substantial likelihood of material prejudice" standard was constitutionally valid. *Id.* at 1060. A different majority of the Court held that the Nevada rule was void for vagueness. *Id.* at 1048.[3]

Chief Justice Rehnquist's majority opinion points out that a lawyer's first amendment rights are to be balanced against the state's interest in regulating the legal profession.

> Even in an area far from the courtroom and the pendency of a case, our decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses. [Citations omitted.] In each of these cases, we engaged in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in

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[3] The majority holding in *Gentile* as to vagueness will be addressed in Section IV of this brief.

> the kind of speech that was at issue. Those cases recognize the long-established principle stated in *In re Cohen*, 7 N.Y.2d 488, 495, 199 N.Y.S.2d 658, 661, 166 N.E.2d 672, 675 (1960):
>
> "Appellant as a citizen could not be denied any of the common rights of citizens. But he stood before the inquiry and before the Appellate Division in another quite different capacity, also. As a lawyer he was 'an officer of the court, and, like the court itself, an instrument . . . of justice . . . ' "

Id. at 1073-1074.

In the present case, Benton's sanctioned conduct was conduct as a lawyer, not as a private citizen. He came to know and have access to the jurors by virtue of his having been the lawyer and their having been the jurors in the dog bite case. As the Texas Supreme Court stated below:

> The lawyer gained access to and influence over the jurors in his capacity as an officer of the court; his privileged position as a member of the bar made them his captive audience at trial . . . If the lawyer tries to continue exerting his influence over the jurors after they have completed their service, he cannot plausibly claim that he is doing so as an ordinary citizen. Under the rationale of *Gentile*, the "substantial likelihood of material prejudice" standard is sufficient protection for attorneys' speech in this context.

A10.

In the present case, there is far more than a "substantial likelihood of material prejudice" to the jury system.

There was actual material prejudice to the jury system. Two of the jurors who received Benton's letter testified at his trial. One stated that in any future jury service he would express bias during voir dire so that he would not be selected on the jury. His reason for doing so would be to avoid getting another letter like Benton's. A15-16. The other juror testified that she had been active in voter registration. Texas courts derive their jury pools in part from voter registration lists. The juror quit volunteering for voter registration for fear that if any prospective registrant asked her about jury duty, she would have to tell him about her experience with Benton's letter. A-16.

Further, Benton's affidavit admits that he intended to influence the jurors. A17. Under the foregoing circumstances Rule 3.06(d)'s ban on remarks calculated "to influence [a discharged juror's] actions in future jury service" does not violate the First Amendment.

II. RULE 3.06(d) OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT IS NOT UNCONSTITUTIONALLY OVERBROAD

The overbreadth doctrine is not to be invoked lightly.

> Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort.

Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). Considerably broader bans than Rule 3.06(d) on contacting jurors have been upheld. *Haeberle v. Texas International Airlines*, 739 F.2d 1019, 1021-22 (5th Cir. 1984), upheld a blanket ban on interviewing discharged jurors. *United States v.*

Harrelson, 713 F.2d 1114, 1118 (5th Cir. 1983), upheld a ban on repeated requests for interviews.

The Texas Supreme Court accurately depicts how Rule 3.06(d) is not overbroad.

> . . . Rule 3.06(d) defines the prohibited speech in terms of the particular evil to be prevented: harassment and embarrassment of discharged jurors, which as we have discussed are by their nature substantially likely to damage our justice system. In addition, the rule prohibits only "questions of" or "comments to" discharged jurors; it does not prevent lawyers from speaking publicly about the jury's verdict.

A22.

III. RULE 3.06(d) OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT IS NOT VIOLATIVE OF THE EQUAL PROTECTION CLAUSE

All of the disciplinary rules of all of the states regulate the conduct of lawyers and don't regulate the conduct of anyone else. Most states have rules that regulate the conduct of just doctors, just engineers, or just cosmetologists. The fact that a set of rules regulates only one profession and not others, certainly doesn't render those rules violative of the Equal Protection clause. Benton's argument would eliminate all rules which govern only a single profession.

As discussed above, Benton did not have a First Amendment right to send the letter to the jurors. Therefore, the prohibition of his sending such a letter "need not

be tested by the strict scrutiny applied when government action impinges upon a fundamental right protected by the Constitution." *Perry Education Ass'n v. Perry Local Educators*, 460 U.S. 37, 54 (1983).

IV. RULE 3.06(d) OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT IS NOT UNCONSTITUTIONALLY VAGUE

The Texas Supreme Court significantly revised Rule 3.06(d). It eliminated the term "embarrass" from the rule. A32-33. It defined "harass" to mean "(1) a course of conduct, (2) directed at a specific person or persons, (3) causing or tending to cause substantial distress, and (4) having no legitimate purpose." A30-31.

Benton is somewhat restricted in arguing that Rule 3.06(d) is unconstitutionally vague by the fact that he stipulated that he violated the rule "because he intended to influence the discharged jurors in future jury service." Petition for Writ of Certiorari, p. 14.

Lawyer disciplinary rules should not be subject to the same constitutional vagueness standards as other statutes. *Howell v. State Bar*, 843 F.2d 205 (5th Cir. 1988), *cert. denied*, 488 U.S. 982 (1988), and *Howell v. State*, 559 S.W.2d 432 (Tex. Civ. App. – Tyler 1977, writ ref'd n.r.e.), are related cases that involve challenges to former State Bar Rule, art. X, § 9, DR 1-102(A)(5) (Texas Code of Professional Responsibility) (1984) as unconstitutionally vague and overbroad. DR 1-102(A)(5) provided in part that a lawyer shall not "[e]ngage in conduct that is prejudicial to the administration of justice."

The Fifth Circuit in *Howell* emphasized that lawyers are granted considerable powers by virtue of their status as lawyers. Consequently, it is not unfair to require lawyers to subject themselves to regulations and discipline that do not apply to the general public.

> In *In re Snyder, supra,* 472 U.S. at 644-45, 105 S.Ct. at 2881, former Chief Justice Burger described the lawyer's role in the administration of justice in the following language:
>
> > As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but also to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.

Howell, 843 F.2d at 208 (citing *In re Snyder,* 472 U.S. 634 (1985)).

A term that may be unconstitutionally vague as interpreted by the general public may not be vague at all as

applied to certain professionals. In *Howell*, the Fifth Circuit held that, in determining the vagueness of a regulatory prohibition, the context of the regulation is of great importance.

> The district court likewise did not err in rejecting appellant's contention that DR 1-102(A)(5) was unconstitutionally vague. The traditional test for vagueness in regulatory prohibitions is whether 'they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.' The particular context in which a regulation is promulgated therefore is all important. The regulation at issue herein applies only to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the 'lore of the profession.'

Howell, 843 F.2d at 208 (citations omitted).

The Texas court of civil appeals considering Howell's vagueness challenge further defined the "context" in which such a challenge should be evaluated. The court noted that:

> The Supreme Court of Oregon has also addressed the question in *Complaint of Rook*, 276 Or. 695, 556 P.2d 1351, 1357 (1976):
>
> > 'As for the contention by the accused that the terms of DR 1-102(A)(5) are unconstitutionally vague, we believe that as standards of professional conduct they are sufficiently definite for the purpose of a professional disciplinary proceeding. . . . We have previously held that such a proceeding is not a criminal proceeding, and that

> the technicalities of criminal law, which are properly invoked to safeguard the liberty of citizens, are not necessarily relevant in the investigation of unethical conduct by an attorney. . . . '

Howell v. State, 559 S.W.2d at 436.

In *State Bar v. Tinning*, 875 S.W.2d 403, 409 (Tex. App. – Corpus Christi 1994, writ denied), the court upheld DR 3-102 against vagueness challenges. The court noted:

> The rule is civil, not penal, in nature, and it regulates a profession whose members can be expected to consult applicable regulations and the writings of bodies empowered to interpret those regulations.

875 S.W.2d at 409.

In summary, the question is not whether the proverbial "ordinary person" would understand the terms at issue. Rather, the court must determine whether a lawyer, with all the powers and responsibilities that title entails, should be able to interpret the terms.

A majority of the Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), found the Nevada disciplinary rule to be unconstitutionally vague. In *Gentile*, the Court held:

> The record does not support the conclusion that petitioner knew or reasonably should have known his remarks created a substantial likelihood of material prejudice, if the Rule's terms are given any meaningful content.

Id. at 1037-1038. In the present case, Benton stipulates that he violated Rule 3.06(d) "because he intended to influence the discharged jurors in future jury service." Petition for Writ of Certiorari, p. 14.

In *Gentile*, the Nevada Rule was found to be unconstitutionally vague because of its "safe harbor" provision.

> As interpreted by the Nevada Supreme Court, the Rule is void for vagueness, in any event, for its safe harbor provision, Rule 177(3), misled petitioner into thinking that he could give his press conference without fear of discipline.

Id. at 1048. Texas Rule 3.06(d) contains no such safe harbor provision.

Gentile "did not blunder into a press conference, but acted with considerable deliberation." *Id.* at 1042.

> On the evening before the press conference, petitioner and two colleagues spent several hours researching the extent of an attorneys's obligations under Rule 177.

Id. at 1044. Benton, as stated above, stipulates that he violated Rule 3.06(d).

Rule 3.06(d), as modified by the Texas Supreme Court, is not unconstitutionally vague as a disciplinary rule for lawyers.

CONCLUSION

Respondent respectfully requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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ALASKA	ALASKA RULES OF PROFESSIONAL CONDUCT. Rule 3.10 (Effective July 15, 1993)
CALIFORNIA	CAL. RULES OF PROFESSIONAL CONDUCT Rule 5-320(D) (Nat'l Rep. on Legal Ethics & Resp. 1994)
COLORADO	COLO. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D) (Nat'l Rep. on Legal Ethics & Resp. 1970)
GEORGIA	GA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D) (Nat'l Rep. on Legal Ethics & Resp. 1996)
ILLINOIS	ILL. RULES OF PROFESSIONAL CONDUCT Rule 3.5(d) (Nat'l Rep. on Legal Ethics & Resp. 1990)
IOWA	IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D) (Nat'l Rep. on Legal Ethics & Resp. 1994)
MAINE	ME. CODE OF PROFESSIONAL RESPONSIBILITY Rule 3.7(f)(2) (Nat'l Rep. on Legal Ethics & Resp. 1990)
MARYLAND	MD. RULES OF PROFESSIONAL CONDUCT Rule 3.5(5) (Nat'l Rep. on Legal Ethics & Resp. 1987)
MASSACHUSETTS	MASS. RULES OF COURT: STATE 1998. MASS. RULES OF PROFESSIONAL CONDUCT Rule 3.5(d) (Adopted July 9, 1997. Effective January 1, 1998)
MINNESOTA	MINN. RULES OF PROFESSIONAL CONDUCT Rule 3.5(c) (Effective July 1, 1985)
NEBRASKA	NEB. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D) (Nat'l Rep. on Legal Ethics & Resp. 1996)

New York	N.Y. Code of Professional Responsibility § 1200.39(d) [DR 7-108(d)] (Nat'l Rep. on Legal Ethics & Resp. 1990)
N. Carolina	N.C. Rules of Professional Conduct Rule 3.5(a)(5) (Effective April 17, 1998)
Ohio	Ohio Code of Professional Responsibility DR 7-108(D) (Nat'l Rep. on Legal Ethics & Resp. 1970)
Oregon	Or. Code of Professional Responsibility DR 7-108(D) (Nat'l Rep. on Legal Ethics & Resp. 1992)
Tennessee	Rules of the Supreme Court of Tennessee. Rule 8. Tenn. Code of Professional Responsibility DR 7-108(D) (Nat'l Rep. on Legal Ethics & Resp. 1996)
Texas	Tex. Disciplinary R. Prof. Conduct 3.06(d). Tex Gov't Code Ann. tit. 2, subtit. G, app. A (Vernon 1998)
Vermont	Vt. Code of Professional Responsibility DR 7-108(D) (Nat'l Rep. on Legal Ethics & Resp. 1986)
Virginia	Va. Code of Professional Responsibility DR 7-107(c) (Nat'l Rep. on Legal Ethics & Resp. 1983)